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No. 444

In the Supreme Court of the United States

OCTOBER TERM, 1945

FLORENCE H. BIGELOW, MARION B. KOEBBER, JOHN E. BLOOM AND WILLIAM C. BLOOM, PETITIONERS

v.

RKO RADIO PICTURES, INC., A CORPORATION, LOEW'S, INCORPORATED, A CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PARAMOUNT PICTURES, INC., A CORPORATION, BALABAN & KATZ CORPORATION, A CORPORATION, VITAGRAPH, INC., A CORPORATION, WARNER BROS. PICTURES, INC., A CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION, AND WARNER BROS. THEATRES, INC., A CORPORATION

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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This is a suit under Section 7 of the Sherman Act and Section 4 of the Clayton Act to recover threefold damages for injury sustained by petitioners by reason of the respondents' violation of Sections 1 and 2 of the Sherman Act. The court below set aside a verdict for petitioners with instructions to enter judgment for respondents *non obstante veredicto*. The court held that there was evidence from which the jury might conclude that

the respondents had illegally conspired to restrain and to monopolize trade and that, as a part of their conspiracy, they had adopted the practice of double featuring in their Chicago theatres. But the court held that, in the absence of evidence as to how much petitioners would have earned if they had been able to purchase motion pictures in a free market, they had failed in sustaining the burden of proving that they had been injured by respondents' conspiracy.

Under the court's holding, persons who destroy a free market by illegally restraining or monopolizing trade may obtain, by their own wrongdoing, practical immunity from the triple-damage suits authorized by Congress. This is so because the illegal conduct makes it impossible to bring forward the only kind of proof of injury which the court here holds will support such a suit. In *Package Closure Corp.* v. *Sealright Co., Inc.*, 141 F. 2d 972, 979 (C. C. A. 2), a suit for triple damages based on violation of the Sherman Act, the court quoted the statement in *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, that where the nature of the antitrust violation precludes ascertaining the amount of damages with certainty, it is sufficient "if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate," and stated: "Often, a failure to apply that doctrine would mean that the more grievous the wrong done to the plaintiff by the

defendant, the less likelihood there would be of a recovery."

Since the conspiracy was designed to draw customers to the respondents' theatres and away from theatres like that of the petitioners, "it is fair to say that the natural and probable effect of the combination" would be to injure the petitioners. Moreover, the petitioners presented evidence that their theatre suffered losses as the direct consequence of the double feature element in the conspiracy and showing the amount "as a matter of just and reasonable inference." *Story Parchment Co.* v. *Paterson Parchment Co., supra*, 561, 563. This was sufficient under the tests laid down by this Court. The court below held against the petitioners, nevertheless, by its erroneous ruling that proof of earnings in a free market is essential to establish recoverable damages.

The conspiracy found by the jury in the present case restrains the trade of all independent operators of motion-picture theatres in Chicago. The court's ruling not only bars the petitioners from recovering the triple damages provided by statute, but it appears equally to bar recovery by all other exhibitors injured by respondents' conspiracy. In addition, suits for damages based on violation of the antitrust laws will be effectively barred in the seventh circuit in all cases in which the violation has destroyed a free market for a considerable period of time, in other words, in all instances in which the violation is particularly damaging and

pernicious. To the extent that the court's decision is followed as a precedent in other circuits, it will have the same effect.

In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728, this Court, after referring to the statutory provisions authorizing persons injured by violation of the antitrust laws to bring suit for injunctive relief and to sue for threefold damages, said: "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes." It must be assumed that Congress believed that there was need for each of the remedies which it provided. Any decision which substantially militates against the effectiveness of one of the remedies is of serious public consequence. While the Government endeavors to enforce vigorously the remedies granted to it, triple-damage suits by injured private parties are an important supplementary aid in bringing about obedience to the commands of the statute.

The Government believes that the decision sought to be reviewed is probably in conflict with applicable decisions of this Court and that the case presents, if there is no such conflict, an important question of Federal law which has not been, but should be, decided by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

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